Petition

81-1553

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No. __-____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

JESSE FRANCESCO MONTEZ,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit

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States Supreme Court Bar
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Dated this 12th day of February, 1982.

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER A DEFENDANT IN A FEDERAL CRIMINAL PROSECUTION FOR CONSPIRACY TO DELIVER HEROIN, DELIVERY OF HEROIN, AND CARRYING A FIREARM DURING THE COMMISSION OF A FELONY PROSECUTABLE IN A COURT OF THE UNITED STATES IS DENIED HIS RIGHT TO TESTIFY ON HIS OWN BEHALF, SECURED BY THE DUE PROCESS CLAUSE OF THE FITH AMENDMENT TO THE FEDERAL CONSTITUTION, WHERE HE DOES NOT TESTIFY SUBSEQUENT TO A DISTRICT COURT RULING THAT IF HE SHOULD TAKE THE STAND IN HIS OWN BEHALF THE GOVERNMENT WOULD BE ALLOWED TO SHOW A PRIOR CONVICTION FOR AGGRAVATED ASSAULT OBTAINED UPON A PLEA OF GUILTY IN THE STATE COURT FOR THE STATE OF TEXAS ON OCTOBER 27, 1980 BASED UPON AN INCIDENT WHICH OCCURRED DECEMBER 26, 1978 PURSUANT TO THE FEDERAL RULES OF EVIDENCE 609(a).

II. WHETHER A DEFENDANT IN A FEDERAL CRIMINAL PROSECUTION FOR CONSPIRACY TO DELIVER HEROIN, DELIVERY OF HEROIN, AND

CARRYING A FIREARM DURING THE COMMISSION OF A FELONY PROSECUTABLE IN A COURT OF THE UNITED STATES IS DENIED HIS RIGHT TO A FAIR TRIAL, SECURED BY THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE FEDERAL CONSTITUTION, ON COUNTS I & II OF THE INDICTMENT BY THE TRIAL COURT'S SUBMISSION OF COUNT III TO THE JURY WHEN THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT A GUILTY VERDICT ON THAT COUNT AND THE COURT GRANTED A JUDGMENT OF ACQUITTAL ON COUNT III AFTER THE JURY RETURNED A GUILTY VERDICT ON ALL THREE COUNTS SUBMITTED TO IT.

III. WHETHER A DISTRICT COURT MAY REJECT A PLEA AGREEMENT ENTERED INTO BETWEEN THE DEFENDANT AND THE GOVERNMENT PURSUANT TO FRCrP 11 AND TENDERED TO THE COURT WHICH INCLUDES A PROVISION THAT THE TERM OF IMPRISONMENT SHALL BE CONCURRENT TO A TERM OF IMPRISONMENT TO BE IMPOSED IN ANOTHER PROSECUTION PENDING IN THE COURT OF THE STATE OF TEXAS, WHERE THE DEFENDANT

IS SENTENCED TO A TERM OF TWO TO FIVE YEARS BY THE STATE COURT OF TEXAS BEFORE SENTENCING IN THE FEDERAL PROSECUTION.

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No. __-____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

JESSE FRANCESCO MONTEZ,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit

Petitioner, Jesse Francesco Montez, respectfully requests that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in this case.

GROUNDS FOR JURISDICTION

Petitioner seeks a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit to review the judgment of that Court entered December 17, 1981 affirming Petitioner's conviction and

sentence imposed by the Honorable James Harvey, District Judge for the Eastern District of Michigan, Northern Division. Neither the Court of Appeals' Order or those of Judge Harvey were published. (App. A)

This Court has jurisdiction to review the case by Writ of Certiorari under 28 USC 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES INVOLVED

AMENDMENT V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FRE 609

> (a) General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall

be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweights its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

FRCrP 11

(e) Plea Agreement Procedure.

(1) In General. The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for dismissal of other charges; or

. . .

(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

. . .

(4) Rejection of a Plea Agreement. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defen-

> dant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

STATEMENT OF THE CASE

On February 3, 1981 Jesse Montez was sentenced to consecutive 12 year terms based on his conviction for conspiracy to violate the federal narcotics law, 21 USC 846, and distribution of a schedule one controlled substance, 21 USC 841(a)(1) and (2). Sentence was imposed by the Honorable James Harvey, District Judge for the Northern Division of the Eastern District of Michigan following a jury trial.

Defendant was arrested on March 6, 1980 after he allegedly delivered approximately one ounce of heroin to a Wayne County Sheriff's Deputy from the Metropolitan Narcotics Squad near Saginaw, Michigan. A four count indictment

was returned against defendant and three others on April 3, 1980 charging defendant: in Count I, with conspiracy to violate the narcotics laws from January 30, 1980 to March 6, 1980, 21 USC 841(a)(1), 846; in Count II with distribution of heroin on March 6, 1980, 21 USC 841(a)(1) and (2); in Count III with carrying a firearm during the commission of a felony prosecutable in the Federal Courts, 18 USC 924(c)(2); and, in Count IV with possession of an unregistered automatic firearm, 26 USC 5861(d), 5871. The charge in Count III of the indictment related to Count II. The allegation in Count IV was based on the execution of a search warrant at a residence subsequent to defendant's arrest.

After resolution of a number of pre-trial motions, defendant tendered a plea to Count II of the indictment pursuant to FRCrP 11(e) on September 9, 1980. Under the terms of the agreement the maximum term of imprisonment was not to exceed five years and would run concurrently with the sentence

imposed in the then pending Texas State case only. In exchange for defendant's plea to Count II the government would dismiss Counts I, III and IV of the indictment. On October 27, 1980 defendant was sentenced to a term of two to five years by a Judge of the 167th District Court for and in the State of Texas. When defendant appeared for sentencing in the Federal prosecution on December 4, 1980 the Court rejected the plea agreement and set the matter for trial.

Before trial defendant filed motions in limine seeking exclusion of references to defendant's prior convictions should he testify in his own defense under FRE 609(a).

The government filed a motion to dismiss Count IV of the indictment immediately prior to trial. The District Court granted this motion prior to the presentation of any evidence.

At the time of the trial in this matter Petitioner had been convicted of a charge of possession of cocaine by the Michigan

courts, MCL 335.153; MSA 18.1123 (since repealed and replaced) in the Saginaw County Circuit Court in 1974 and aggravated assault in the 167th District Court of the State of Texas on October 27, 1980 based on conduct which occurred December 26, 1978. Both prior convictions were the result of pleas of guilty.

The Court held a hearing on the motion before opening statements were made to the jury. The Court ruled that the government could not make reference to the prior cocaine conviction should defendant take the stand in his own defense, but ruled the government could impeach defendant with the recent assault conviction should he testify. (Tr 60-62) Defendant did not testify before the jury.

At the conclusion of the Assistant U.S. Attorney's opening statement defense counsel moved to dismiss Count III of the indictment, carrying a firearm during the commission of a felony prosecutable in the Federal District Court, because it was

apparent that Montez had no weapon during the transfer charged in Count II, the felony upon which Count III was based. (Tr 83-86) The Court ruled the motion was premature. Counsel objected to admission of the weapons upon which this Count was based as an evidentiary matter (Tr 170-171) and again when the Government concluded its case. (Tr 172-180) The District Court denied the defendant's request on each occasion.

The jury found the defendant guilty on all three Counts submitted to it on January 16, 1981. The Court entered a Judgment of Acquittal based on the legal insufficiency of the evidence as to Count III on January 21, 1981.

The defendant perfected a timely appeal to the United States Court of Appeals for the Sixth Circuit following his conviction. That Court, after hearing oral arguments, affirmed the decision without opinion on December 17, 1981.

The United States District Court for

the Eastern District of Michigan, Northern Division had original jurisdiction of this prosecution under 18 USC 3231.

REASONS FOR GRANTING WRIT

IMPEACHMENT QUESTION

A recurring problem in criminal prosecutions in the Federal system is the balance between a defendant's right to testify in his own behalf unimpeded by the threat of impeachment through convictions with no probative value on the issue of credibility and a jury's right to weigh the credibility of all witnesses, including a defendant. Congress attempted to resolve this problem in the version of FRE 609(a) adopted. (Pub. L 93-595, January 2, 1975, 88 Stat. 1926) As applied by the District Court and affirmed by the Sixth Circuit FRE 609(a) deprived Jesse Montez of his right to testify in this prosecution.

Whether a defendant in a Federal criminal prosecution may be impeached by a conviction for assaultive behavior secured

subsequent to his indictment consistent with his right to testify is an important question of federal law which this Court ought to decide in this case.

It is apparent that defendant's aggravated assault conviction is not of the type which would be admissible under FRE 609(a)(2). Assaultive behavior does not involve dishonesty or false statement. United States v Harvey, 588 F2d 1201, 1203 (CA 8, 1978), United States v Hayes, 553 F2d 824, 827 (CA 2, 1977) cert dnd 434 US 867 (1978). There is no indication that Judge Harvey believed that this prior conviction for aggravated assault was admissible under FRE 609(a)(2).

The question presented to Judge Harvey and to the Sixth Circuit was whether the aggravated assault conviction could properly be shown under FRE 609(a)(1) in the present case consistent with the defendant's right to testify. Petitioner believes that convictions based on assaultive behavior have no probative value on the issue of

credibility and should thus be excluded from use as impeaching evidence.

The lower courts have consistently failed to adequately review questions of this nature. If a District Court lists a variety of factors in its balancing formula, that decision is routinely affirmed as presenting no abuse of discretion. 3 Weinstein's Evidence, ¶609[04] p 609-81. This tendency to give rubber stamp approval fails to recognize the consitutional dimension of a defendant's right to testify.

The primary factor in determining whether a prior conviction should be allowed to be shown is the impeachment value of that crime. United States v Ortiz, 553 F2d 782, 784 (CA 2, 1977), United States v Crawford, 198 US App DC 312; 613 F2d 1045, 1052 (1979). Evidence is admissible under FRE 609(a)(1) for a very limited purpose: to reflect on the defendant's honesty or veracity. It is not admissible

merely to show the defendant is a bad person or is likely to have committed the charged crime because of a prior conviction. The less a prior conviction would aid a Jury in considering a defendant's veracity, the greater the need to exclude it.

Courts which have considered the question have generally agreed that assaultive crimes are not probative on the issue of veracity. See e.g., Jones v United States, 131 US App DC 88; 402 F2d 639 (1968), United States v Hayes, supra at 609, Unites States v Jackson, 405 F Supp 938, 942 (ED NY, 1975). See also, 39 ALR Fed 570, 600, §15(c). Because this type of conviction has no probative value on the issue of veracity it should be subject to an automatic rule of exclusion.

Another factor is the temporal relationship between the conviction and its use for impeachment. The District Court appears to have relied heavily on the fact that Defendant plead guilty to

the assault charge only months before the present trial. What was ignored was that the conviction occurred only after defendant was indicted on the present charges.

Although some courts have stated that the more recent a conviction the stronger it bares on veracity, others have recognized a danger in this analysis. The apparent "freshness" of a conviction should not outweigh other factors which would point to its exclusion. United States v Crawford, supra at 1051. Indeed, it has been recognized that a Jury's knowledge that a defendant has only recently been convicted of a felonious assault may have an unduly significant impact by the inappropriate reasoning that conviction for one offense is evidence of guilt on the present charge. United States v Jackson, supra at 942 (excluding a recent assault conviction).

This Court should grant a writ of certiorari to settle the important question of the use of assaultive type convictions for impeachment purposes under FRE 609(a)(1).

Those cases which have adequately considered the question have held that the assaultive type conviction bares no reasonable relationship to truth or veracity. When the effect of allowing such a conviction to be used for impeachment purposes is to deprive the defendant of his right to testify, he is denied a fair trial. The decision of the Sixth Circuit in this case is contrary to the decisions in the other circuits which have considered this question.

IMPROPER SUBMISSION TO JURY

A second important question of federal law presented by this case relates to the basic right to a fair trial. The Courts below have sanctioned a procedure which allowed the government to present evidence to the jury on a Count which was legally insufficient to support a conviction on that count and could have had no other effect than to prejudice its consideration of the other counts. This Court should

grant certiorari to determine whether a defendant is entitled to a new trial on evidentiary sufficient counts of an indictment where jury consideration of those counts was tainted by submission of a count which was not supported by sufficient evidence.

A trial judge has authority in a criminal case to dismiss a prosecution or a particular count of a multi-count indictment on the basis of the government's opening statement. It is particularly appropriate where the facts outlined in the opening statement do not show a violation of the statute under which the defendant is being prosecuted. Annot. 75 ALR 3rd 649, 656 §3(a).

A trial court is also authorized to enter a Judgment of Acquittal at the close of the government's proofs or the close of all proofs where the facts shown do not fit the statute under which the defendant is charged. United States v Bethea, 143 US App DC 68; 442 F2d 790 (1971). It has

been held that unless a guilty verdict or conviction is possible on the evidence presented a Judge must not let the Jury consider the case. Bailey v United States, 135 US App DC 95; 416 F2d 1110, 1113 (1969), United States v Staten, 189 US App DC 100; 581 F2d 878 (1978).

A trial court's submission of a count which is not supported by evidence is prejudicial in several respects. First, the more counts which are submitted to a jury the greater the likelihood that a conviction on some counts or count will occur. Second, certain evidence which is admissible to support a particular charge is not admissible on the other charges. Both of these items of prejudice occurred in this case.

The failure of the Sixth Circuit to grant a new trial is inconsistent with prior authorities and should not be allowed to stand.

PLEA AGREEMENT

A third question of law which ought to be decided by the Court in this case is under what circumstances a Court may reject a plea agreement under FRCrP 11(e)(1)(C) and (4). The courts below have imposed convictions and consecutive sentences where the government, as expressed in the plea agreement, was satisfied with a single conviction and sentence. As applied, the District Court has invaded the authority of the executive branch of government to prosecute, something not intended or allowed by FRCrP 11(e)(4) or the Constitution.

The plea agreement provided that Jesse Montez would be sentenced to five years imprisonment for delivery of heroin, Count II). After the Court's rejection of his plea he received two consecutive 12 year sentences. The interest of society, as represented by the United States Attorney, and the interest of the defendant were acknowledged to be best served in the

agreement. The District Court's rejection of the agreement was unwarranted. It was based on an event which occurred subsequent to the agreement but which was anticipated by the agreement.

Where the Court rejects a plea it must have a reason for doing so. That reason must be consistent with this Courts recognition that pleas of guilty are essential to a functioning criminal justice system as it has come to exist in this country and the necessity of protecting the rights of an accused. Santobello v New York, 404 US 257 (1971). Where rejection of a plea is based not on a finding that the plea is not voluntarily or knowingly made, but on a non-permissible reason, such as imposition of an unexpected sentence in a state court, the agreement should be reinstated. cf. Griffin v United States, 132 US App DC 108; 405 F2d 1378 (1968), United States v Gaskin, 158 US App DC 267; 485 F2d 1046 (1973), In re Arvedon, 523 F2d 914 (CA 1, 1975).

Because of the role plea bargaining plays in our criminal justice system and the necessity of some degree of confidence that bargains struck between the parties will be honored this Court should grant certiorari to give the lower courts guidance on the requirements of FRCrP 11(e).

CONCLUSION

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Dated this 12th day of February, 1982.

Appendix

No. 81-1101

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff-Appellee,	:	
	:	
vs	:	O R D E R
	:	
JESSE FRANCESCO MONTEZ,	:	
	:	
Defendant-Appellant.	:	

BEFORE: ENGEL, BROWN, Circuit Judges, CECIL, Senior Circuit Judge

This cause having come on to be heard upon the record, the briefs and the oral argument of the parties, and upon due consideration thereof,

The Court finds that no prejudicial error intervened in the judgment and proceedings in the District Court, and

It is therefore ORDERED that said judgment be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT.

s/ John P. Hehman
John P. Hehman, Clerk

FILED DECEMBER 17, 1981 JOHN P. HEHMAN, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v

CRIMINAL ACTION
NO: 80-20013-0

JESSE FRANCESCO MONTEZ,

Defendant.
_____/

JUDGMENT OF ACQUITTAL

At a session of said court, held in the Federal Building, Bay City, Michigan on January 21, 1981

PRESENT: HONORABLE JAMES HARVEY
United States District Judge

On January 16, 1981, after three days of trial in this matter, a jury found the defendant herein guilty of conspiracy to possess heroin with intent to distribute in violation of 21 USC 841(a)(1) and 846 (Count I); distribution of heroin in violation of 21 USC 841(a)(1)(Count II); and unlawful carrying of a firearm during the commission of a felony in violation

of 18 USC 924(c)(2) (Count III). At the close of all proofs, counsel for the defendant moved for a Judgment of Acquittal on Count III of the Indictment. The Court reserved its decision on the motion and submitted the case to the jury. The Court is now prepared to rule on the motion.

Pursuant to FR Crim P 29, the Court believes that, given the narrow facts of this case regarding whether the defendant's unlawful carrying of a firearm occurred during the commission of a felony, the evidence presented at trial was "insufficient to sustain a conviction" of 18 USC 924(c)(2).

Accordingly, the jury verdict of guilty of Count III of the indictment is hereby SET ASIDE and the defendant is ACQUITTED on the charge.

IT IS SO ORDERED.

s/ James Harvey
JAMES HARVEY
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v

CRIMINAL ACTION
NO: 80-20013-0

JESSE FRANCESCO MONTEZ,

Defendant.
_____/

JUDGMENT AND PROBATION COMMITMENT ORDER

At a session of said court, held in the Federal Building, Bay City, Michigan on February 4, 1981

PRESENT: HONORABLE JAMES HARVEY
United States District Judge

Count I: IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General for imprisonment for a term of 12 years and that defendant shall become eligible for parole, under 18 USC 4205(a).

Count II: IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General for imprisonment

for a term of 12 years and that defendant shall become eligible for parole, under 18 USC 4205(a).

Pursuant to 21 USC 841, the defendant is further sentenced upon release from custody to a special parole term of 20 years.

It is the intention of the Court that the sentence imposed by the Court on Count II, shall be consecutive to the sentence imposed on Count I.

BOND IS CANCELLED.

IT IS SO ORDERED.

s/ James Harvey
JAMES HARVEY
United States District Judge

Opposition

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In the Supreme Court of the United States

OCTOBER TERM, 1981

JESSE FRANCESCO MONTEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in ruling that evidence of a recent conviction for aggravated assault could be used to impeach petitioner's credibility.

2. Whether submission to the jury of a charge on which the trial court ultimately entered a judgment of acquittal notwithstanding the jury's guilty verdict tainted the verdicts returned on two other charges.

3. Whether the adequacy of the sentence contemplated by a plea agreement is an appropriate consideration in determining whether a plea agreement should be accepted pursuant to Fed. R. Crim. P. 11(e)(2).

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1553

JESSE FRANCESCO MONTEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. A1) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 1981 (Pet. App. A1). The petition for a writ of certiorari was filed on February 16, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of distributing heroin and conspiring to distribute heroin, in violation of 21 U.S.C. 841(a)(1) and 846, and carrying a firearm unlawfully during the commission of a felony (*i.e.*, distribution of heroin), in violation of 18 U.S.C.

924(c)(2). The district court set aside the jury verdict on the firearms charge and entered a judgment of acquittal (Pet. App. A3). Petitioner was sentenced to consecutive terms of 12 years' imprisonment on each of the heroin convictions, to be followed by a special parole terms of 20 years (*id.* at A4-A5). The court of appeals affirmed (*id.* at A1).

Petitioner was arrested following a typical undercover narcotics investigation. Petitioner telephoned an undercover police officer, Sergeant Melvin Turner, and arranged to meet him in Saginaw, Michigan, to consummate a heroin transaction (Tr. 97-100).[1] Later, Turner told petitioner to bring an ounce of heroin for him to sample (Tr. 103). Petitioner and another man arrived at the rendezvous site in a blue Chevrolet; petitioner directed Turner to follow him and drove to a nearby parking lot. Petitioner then came out of his car and entered that driven by Turner; another undercover police officer, Curlie Thompson, was also in the car with Turner. Petitioner handed the heroin sample to Turner (Tr. 103-105), who examined it, stated that he was satisfied, and offered to purchase a larger quantity. Turner attempted to pay for the sample, but petitioner told him to wait until they arrived at petitioner's house, where the larger transaction would take place (Tr. 108).

Petitioner then reentered his car and told the officers to follow him in theirs (Tr. 108-109). The police officers decided to arrest petitioner immediately. Other officers blocked the path of petitioner's car, and Officers Turner and Thompson arrested petitioner and his accomplice (Tr. 112). When Turner opened petitioner's car door, he saw two automatic pistols lying on the "transmission hump" (Tr. 113). Both pistols were loaded (Tr. 113-114). After being

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[1]Turner had previously spoken with petitioner and one of his co-conspirators, Johnnie Acosta, about purchasing heroin in a tape recorded telephone conversation (see Tr. 95-97, 183).

read his Miranda rights, petitioner told Turner (Tr. 115) that "if he could have gotten to his gun, * * * he would have made it a hot time for the officers coming toward the front of [his] vehicle."

Sergeant Turner's testimony was corroborated in detail by Officer Thompson, except with respect to the guns (Tr. 130-139). When asked whether he observed "anything" in petitioner's car at the time of the arrest, Thompson replied that he had not (Tr. 138-139). Turner's basic testimony was also corroborated by Officer Harold Stockton (Tr. 142-147) who had followed petitioner to the rendezvous site. Stockton saw petitioner enter the undercover vehicle, remain for a brief time, and return to his car (Tr. 147).[2]

ARGUMENT

1. Petitioner contends (Pet. 9-14) that the district court erred in ruling that, if petitioner testified, his conviction for aggravated assault could be used to impeach his credibility under Fed. R. Evid. 609(a)(1).[3] Before trial, petitioner moved to exclude evidence of his felony assault conviction and of a 1974 conviction for possession of cocaine (Tr. 12-13). After argument on the motion (Tr. 14-23), the district court ruled that if petitioner testified the government would be permitted to use the assault conviction, but not the cocaine conviction, for impeachment (Tr. 60-62). Both convictions were punishable by imprisonment in excess of one year, and neither occurred more than 10 years before trial in this case. Accordingly, if the court determined "that the probative value of admitting * * * evidence [of these

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[2]The defense presented no evidence. See Tr. 188. Defense counsel's closing argument was not transcribed. See Tr. 197.

[3]Petitioner was convicted of aggravated assault in a Texas state court on October 27, 1980. The assault occurred on December 26, 1978 (Pet. 7).

convictions] outweigh[ed] its prejudicial effect" to petitioner, it was admissible for the purpose of attacking petitioner's credibility. Fed. R. Evid. 609(a)(1); compare Fed. R. Evid. 401, 402 and 403. Citing *United States* v. *Mahone*, 537 F. 2d 922 (7th Cir.), cert. denied, 429 U.S. 1025 (1976), the district court (Tr. 61-62) explained that the probative value of the assault conviction outweighed its prejudicial effect because, if he testified, petitioner's credibility would become a "central" issue in the case and because the assault conviction was quite recent. See note 3, *supra*. The court concluded, however, that the probative value of the cocaine conviction was outweighed by its prejudicial effect because the conviction was not very recent and, more important, it was so similar to the heroin charge in this case that it would be likely to cause substantial and unfair prejudice to petitioner. Thus, the district court engaged in the balancing process contemplated by Rule 609(a)(1) and plainly did not abuse its broad discretion in deciding such questions. See, *e.g.*, *United States* v. *Mahone*, *supra*, 537 F. 2d at 928-929.[4]

Petitioner contends (Pet. 10-12) that evidence of an assault conviction should not be admissible to impeach a defendant under Fed. R. Evid. 609(a)(1) because such a conviction is of no probative value and the prospect of impeachment with such evidence may deter a defendant from exercising his right to testify in his own behalf. Rule 609(a)(1) expressly leaves to the sound discretion of the district court the determination of whether the probative

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[4]Even if the court had allowed use of the more prejudicial narcotics conviction for impeachment purposes, there would have been no abuse of discretion. See, *e.g.*, *United States* v. *Hayes*, 553 F. 2d 824, 826-828 (2d Cir.), cert. denied, 434 U.S. 867 (1977); *United States* v. *Ortiz*, 553 F. 2d 782, 784 (2d Cir. 1977); *United States* v. *Dixon*, 547 F. 2d 1079, 1084 (9th Cir. 1976); *United States* v. *McIntosh*, 426 F. 2d 1231, 1233-1234 (D.C. Cir. 1970).

value of evidence of a conviction not involving dishonesty or false statements outweighs its prejudicial effect on the defendant.[5] There is no reason for establishing an exception to the plain language of the rule for assault convictions. Nor does petitioner suggest that any court of appeals has adopted such an exception to the rule that commended itself to Congress.[6]

2. Petitioner argues (Pet. 14-16) that because the court ultimately entered a judgment of acquittal on the firearms count, submission of that count to the jury was reversible error. The short answer to this claim is that petitioner received a windfall when the court granted his post-verdict

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[5]It may be that, as Judge Weinstein has observed, "[c]onsidered in the abstract, prior assaultive conduct would seem to have little bearing on the likelihood that one will tell the truth." *United States* v. *Jackson*, 405 F. Supp. 938, 942 (E.D.N.Y. 1975). On the other hand, it would not be unreasonable to infer that a person who has recently committed a crime (whether or not it involves dishonesty or false statements) is more likely than one who has never committed a crime to disregard the laws against perjury or his oath to tell the truth. Indeed, in the *Jackson* case, which petitioner relies upon (Pet. 12, 13), Judge Weinstein excluded evidence of the assault conviction only on condition that the defendant refrain from suggesting that he had "a pristine background on direct." 405 F. Supp. at 943. Nothing in *Jackson* suggests that assault convictions may never be used to impeach a defendant.

[6]Whatever the merits of the court's evidentiary ruling, petitioner plainly suffered no prejudice. The only specific concern expressed with respect to the evidence of the assault conviction was its potential impact on the jury's consideration of the firearms charge (Tr. 21-22), on which the court ultimately entered a judgment of acquitfal. In the court of appeals, petitioner admitted (Br. of Appellant 12-13) that the district court's evidentiary ruling was not the only factor in his decision not to testify and that, in any event, he "would have had little to say concerning Count II," which charged the substantive heroin offense. Petitioner asserted that he would have had more to say with respect to the conspiracy charge, but he has never offered any indication of what that might be.

motion for judgment of acquittal. The court had correctly denied petitioner's motion to dismiss that count, citing (Tr. 171) *United States* v. *Barber*, 594 F. 2d 1242, 1244-1245 (9th Cir.), cert. denied, 444 U.S. 835 (1979), for the proposition that the word "carries" as used in Section 924(c)(2) includes transportation of a weapon in a vehicle during the commission of a felony.[7] Although there was an issue of fact as to whether the two pistols were in petitioner's car at the time of his arrest, that issue turned on Sergeant Turner's credibility and was for the jury to decide.

In any event, even assuming that the trial court correctly granted petitioner's motion for judgment of acquittal on the firearms charge, petitioner offers no explanation of how the jury's consideration of that charge could have affected its verdicts on the two heroin charges. Without elaboration, petitioner asserts that he suffered prejudice because "certain evidence which is admissible to support a particular charge is not admissible on the other charges" (Pet. 16). Whatever prejudice of this sort petitioner suffered would not have been avoided by granting petitioner's motion for judgment of acquittal at the close of the government's case. Once the

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[7]The defendant in *Barber* argued that the word "carries" denotes only the concept of having a weapon upon one's person or within one's immediate control. The court of appeals rejected this claim, noting that the ordinary meaning of the term embraced transportation of a weapon in the locked glove compartment of a vehicle. *Barber* involved an undercover drug transaction virtually identical to that here. Moreover, in this case the two guns were clearly within petitioner's control when he re-entered his car, even if it is possible that he did not have one of the guns on his person when he transferred the heroin to the undercover police officer.

testimony concerning the firearms charge was in evidence, whatever damage it caused was done.[8] Moreover, in view of the overwhelming evidence of guilt on the heroin charges, the evidence regarding the pistols could not have been significant.

3. Petitioner contends (Pet. 17-19) that the district court erred in rejecting the proposed plea agreement. This claim was not raised in the court of appeals and therefore need not be considered here. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). In any event, the claim is frivolous. Fed. R. Crim. P. 11(e)(2) specifically authorizes a district court to reject a plea agreement if the agreement provides for a specific sentence or dismissal of other charges. Petitioner suggests that the court had "no reason" for rejecting the agreement. Given the sentence the court ultimately imposed, however, it is apparent that the court rejected the agreement because it believed that petitioner's crime warranted a more severe sentence than the five-year term of imprisonment provided for in the plea agreement. This was clearly a legitimate reason for rejecting the agreement. Contrary to petitioner's assertion (Pet. 17), the district court's apparent conclusion that the sentence contemplated by the plea agreement was too lenient does not constitute any invasion of "the authority of the executive branch." The appropriate sentence, within the limits established by Congress, is a matter committed to the discretion of the judiciary and not the executive.

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[8]Petitioner does not seriously contend that the court's denial of his motion for dismissal of the firearms charge after the government's opening statement and before the introduction of any evidence was an abuse of discretion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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